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Isnin bin Hj Aliasnih v Lajim bin Ukin

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-1–01 OF 2014 (S)

ZULKEFLI CJ (MALAYA), SURIYADI, AHMAD MAAROP, APANDI ALI AND RAMLY ALI FCJJ

30 JUNE 2014

C

Election — Petition — Allegation of corrupt practices — Bribery — Whether polling agent acted on frolic of her own in distributing money and coupons — Whether knowledge and consent of respondent in polling agent's acts proven — Whether polling agent comes within definition of agent under Election Offences Act 1954 — Whether respondent liable for polling agent's acts — Election Offences Act 1954 ss 10(a), 11(1)(b), 11(1)(c), 32(b) & 32(c)

D

E *Evidence — Presumptions — Adverse inference under s 114(g) of the Evidence Act 1950 — Failure of petitioner to call material witness — Whether adverse inference should be invoked against respondent for failing to call the same witness — Burden on petitioner to prove case*

F This was an appeal from the decision of the election judge of the High Court ('the judge') in relation to alleged election offences under ss 10(a), 11(1)(b), 11(1)(c), 32(b) and 32(c) of the Election Offences Act 1954 ('the Act'). It was alleged by the appellant that the respondent's polling agent, one Norliah, had committed corrupt practice of bribery and corrupt practices by of printing, publishing and distributing handbills which did not bear upon its face the names and addresses of its printers and publisher. The judge had made a finding of facts as follows: (a) that Norliah was a polling agent for the respondent; (b) that there was indeed the giving of RM50 notes and coupons to PW3 and PW4; and (c) that there was an element of inducement to vote for the respondent. However, the appellant contended that the judge had erred when she decided that Norliah acted on a frolic of her own when she distributed the RM50 notes and coupons on 4 May 2013, a day before the polling day. The appellant further contended that the judge erred in holding that the appellant had failed to prove knowledge and consent of the respondent in relation to the act of Norliah in distributing the RM50 notes and coupons on 4 May 2013. The appellant claimed that Norliah was an agent to the respondent and as such there was no legal requirement to prove knowledge or consent under the third limb of s 32(c) of the Act. Hence, the question to be addressed in this appeal was whether Norliah came within the definition of

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agent under the Act and whether the respondent was liable for Norliah's acts as his agent. A

Held, dismissing the appeal with costs:

(1) To make the respondent liable for the acts committed by Norliah, the appellant must adduce sufficient evidence to establish her appointment as the agent of the respondent on 4 May 2013. This is in compliance with the principle as laid down in the Federal Court's case of *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473 (see para 14). B

(2) The appellant failed to adduce sufficient evidence that Norliah was an 'agent' of the respondent on 4 May 2013. Without proof that Norliah as the campaigner was acting within the scope of her authority as an agent or with instructions and knowledge of the respondent on 4 May 2013, her acts as a campaigner or party supporter during election campaign could not make the respondent as the candidate liable (see para 15). C D

(3) The judge was correct in her decision that Norliah's action on 4 May 2013 was outside the scope of the duty as 'polling agent'. What Norliah did on 4 May 2013 was 'on a frolic of her own'. Further, the impugned acts were committed on 4 May 2013 but not on 5 May 2013. The polling agent was only required to be on duty on polling day, 5 May 2013. Thus, the impugned acts allegedly committed by Norliah on 4 May 2013 before her performance and discharge of her duty as 'polling agent' could not make the respondent liable (see para 17). E

(4) The appellant failed to provide sufficient facts and grounds pursuant to r 4(1)(b) and 4(4) of the Election Petition Rules 1954 ('EPR') in so far as the nexus required to implicate the culpability of the respondent and void the election under ss 32(b) and 32(c) of the Act. Compliance with r 4(1)(b) and 4(4) of the EPR is mandatory (see para 18); *Mahari bin Endut v Dato' Haji Mat Razali bin Kassim & Ors* [2009] 5 MLJ 153 referred. F G

(5) As regards the appellant's contention that neither Norliah nor the respondent's election agent was called to testify as a witness for the respondent and for that reason an adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the respondent, such a contention was untenable in the circumstances of this case. The burden was placed upon the appellant to first prove his case against the respondent. It is settled law in election petition cases that it is for the petitioner to establish a prima facie case before the respondent is required to answer. It was for the appellant to prove who Norliah was and that she was the appointed agent of the respondent who distributed the RM50 notes and coupons on 4 May 2013. This the appellant failed to prove (see para 22). H I

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[Bahasa Malaysia summary

Rayuan ini adalah daripada keputusan hakim pilihan raya di Mahkamah Tinggi ('hakim pilihan raya') berkaitan dakwaan kesalahan-kesalahan pilihan raya di bawah ss 10(a), 11(1)(b), 11(1)(c), 32(b) dan 32(c) Akta Kesalahan-Kesalahan Pilihan Raya 1954 ('Akta tersebut'). Ia didakwa oleh perayu bahawa ejen tempat mengundi responden, Norliah, telah melakukan amalan rasuah sogokan dan amalan rasuah dengan mencetak, menerbit dan mengedarkan 'handbills' yang tidak mempunyai nama-nama dan alamat-alamat pencetak dan penerbitnya. Hakim pilihan raya telah membuat penemuan fakta seperti berikut: (a) bahawa Norliah adalah ejen tempat mengundi untuk responden; (b) bahawa sememangnya terdapat pemberian wang RM50 dan kupon-kupon kepada PW3 dan PW4; dan (c) bahawa terdapat elemen dorongan untuk mengundi responden. Walau bagaimanapun, perayu berhujah bahawa hakim pilihan raya terkhilaf apabila memutuskan bahawa Norliah bertindak sewenang-wenangnya apabila dia mengedarkan wang RM50 dan kupon-kupon pada 4 Mei 2013, sehari sebelum hari pengundian. Perayu selanjutnya berhujah bahawa hakim pilihan raya terkhilaf dalam memutuskan bahawa perayu telah gagal untuk membuktikan pengetahuan dan persetujuan responden berkaitan tindakan Norliah dalam mengedarkan wang RM50 dan kupon-kupon pada 4 Mei 2013. Perayu mendakwa bahawa Norliah adalah ejen kepada responden dan oleh itu tiada keperluan dari segi undang-undang untuk membuktikan pengetahuan atau persetujuan di bawah cabang ketiga s 32(c) Akta tersebut. Justeru, persoalan untuk dikemukakan dalam rayuan ini adalah sama ada Norliah terangkum dalam definisi ejen di bawah Akta tersebut dan sama ada responden bertanggungjawab untuk tindakan Norliah sebagai ejennya.

Diputuskan, menolak rayuan dengan kos:

(1) Untuk menjadikan responden bertanggungjawab atas tindakan-tindakan yang dilakukan oleh Norliah, perayu hendaklah mengemukakan keterangan mencukupi bagi membuktikan pelantikannya sebagai ejen responden pada 4 Mei 2013. Ini mematuhi prinsip yang diputuskan dalam kes Mahkamh Persekutuan *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473 (lihat perenggan 14).

(2) Perayu gagal untuk mengemukakan keterangan mencukupi bahawa Norliah adalah 'ejen' responden pada 4 Mei 2013. Tanpa bukti bahawa Norliah sebagai seorang yang berkempen bertindak dalam skop kuasanya sebagai ejen atau dengan arahan dan pengetahuan responden pada 4 Mei 2013, tindakan-tindakan sebagai seorang yang berkempen atau pihak penyokong parti semasa kempen pilihan raya tidak menjadikan responden sebagai calon bertanggungjawab (lihat perenggan 15).

(3) Hakim pilihan raya adalah betul dalam keputusan beliau bahawa

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tindakan Norliah pada 4 Mei 2013 adalah di luar skop kewajipan sebagai 'polling ejen'. Apa yang dilakukan oleh Norliah pada 4 Mei 2014 adalah 'on a frolic of her own'. Selanjutnya, tindakan-tindakan yang dipersoalkan telah dilakukan pada 4 Mei 2013 tetapi bukan pada 5 Mei 2013. Ejen tempat mengundi itu hanya dikehendaki bertugas pada hari pengundian, iaitu 5 Mei 2013. Oleh itu, tindakan-tindakan yang dipersoalkan yang dikatakan telah dilakukan oleh Norliah pada 4 Mei 2013 sebelum prestasi dan pelepasan kewajipannya sebagai 'polling agent' tidak menjadikan responden bertanggungjawab (lihat perenggan 17).

(4) Perayu telah gagal mengemukakan fakta dan alasan mencukupi menurut k 4(1)(b) dan 4(4) Kaedah-Kaedah Petisyen Pilihan Raya 1954 ('KPP') setakat masa neksus diperlukan untuk mengaitkan kebersalahan responden dan menjadikan pilihan raya itu tidak sah di bawah ss 32(b) dan 32(c) Akta tersebut. Pematuhan k 4(10(b) dan 4(4) KPP adalah mandatori (lihat perenggan 18); *Mahari bin Endut v Dato' Haji Mat Razali bin Kassim & Ors* [2009] 5 MLJ 153 dirujuk.

(5) Berhubung hujah perayu bahawa Norliah atau ejen pilihan raya responden tidak dipanggil untuk memberi keterangan sebagai saksi responden dan disebabkan itu inferens bertentangan di bawah s 114(g) Akta Keterangan 1950 hendaklah digunakan terhadap responden, hujah sedemikian tidak dapat dipertahankan berdasarkan keadaan kes ini. Beban terletak pada perayu untuk terlebih dahulu membuktikan kesnya terhadap responden. Adalah undang-undang tetap dalam kes-kes petisyen pilihan raya bahawa adalah untuk pempetisyen membuktikan kes prima facie sebelum responden dikehendaki menjawab. Adalah untuk perayu membuktikan siapa Norliah dan bahawa dia adalah ejen yang dilantik oleh repsonden yang mengedar nota-nota RM50 dan kupon-kupon itu pada 4 Mei 2013. Ini yang gagal dibuktikan oleh perayu (lihat perenggan 22).]

Notes

For a case on adverse inference under s 114(g) of the Evidence Act 1950, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2416.

For cases on allegation of corrupt practices, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2130–2145.

Cases referred to

Audrey Karen Barry v Datuk Dr Yee Moh Chai [2009] 3 MLJ 141; [2010] 3 CLJ 660, FC (refd)

Harwich Borough Case, Tomline v Tyler (1880) 3 O'M & H 61 (refd)

Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors [2009] 5 MLJ 153, FC (refd)

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Wan Sagar bin Wan Embong v Harun bin Taib [2008] 6 MLJ 473; [2009] 1 CLJ 457, FC (refd)

Legislation referred to

Election Offences Act 1954 ss 10(a), 11(1)(b), 14(1)(c), (d), 14(1A), 32(b), (c)
Election Petition Rules 1954 r 4(1)(b), (4)
Evidence Act 1950 s 114(g)

Mohd Hafarizam Harun (Japar Esteban, Muammar Julkarnain and Rizwandeen M Borhan with him) (Esteban A'liq & Co) for the appellant.
Chau Chin Tang (Lawrence Thien and Al Zarefee Mohd Shukor with him) (Chau & Thien) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the decision of the election judge of the High Court at Kota Kinabalu in which the election petition filed by the appellant (petitioner in the High Court) was dismissed following a full trial. The appellant was the Barisan Nasional candidate in the 13th General Election for a seat in the State Legislative Assembly of Sabah for the constituency of Klias (N25) which was held on the 5 May 2013 whilst the respondent was the Parti Keadilan Rakyat ('PKR') candidate. The respondent was declared as the duly elected member of the said constituency of Klias by polling 6,324 against the appellant 6,145 — a majority of 179.

[2] The learned election judge dismissed the election petition on the ground that the appellant as the petitioner had failed to produce sufficient evidence to nullify the election. In her judgment she, inter alia, held as follows:

> In my view, the petitioner has not adduced any evidence that has proven to the court's satisfaction and showed with certainty that the respondent had knowledge of and consented to the corrupt act of the Polling Agent by the name of Norliah in giving out envelopes with RM50 note and a coupon which can be produced to redeem a further sum of RM100 if the respondent was elected (see p 48 of the records of appeal).

AGREED ISSUES TO BE TRIED BEFORE THE ELECTION JUDGE

[3] It is pertinent to note at the outset that both parties agreed to adopt the respondent issues to be tried before the election judge (see p 64 of the records of appeal). The learned election judge had also identified Wong Kui En @ Norliah as the 'polling agent' constituting the main element to be tried for election offences under ss 10(a), 11(1)(b), 11(1)(c), 32(b) and 32(c) of the

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Election Offences Act 1954 ('the Act'). The agreed issues to be tried before the election judge are as follows:

Issue No 1

Whether the respondent by his alleged polling agent one Wong Kui En @ Norliah had committed corrupt practice of bribery as defined in s 10(a) and in contravention of s 11(1)(b) of the Act and as envisaged under section 32(c) of the Act based on the particulars as pleaded in paras 3.9, 3.9.1, 3.9.2 and 3.9.3 of the election petition.

Issue No 2

Whether the respondent by his alleged polling agent one Wong Kui En @ Norliah had committed corrupt practice of bribery as defined in s 10(a) and in contravention of s 11(1)(b) of the Act and as envisaged under s 32(c) of the Act based on the particulars as pleaded in paras 3.10, 3.10.1, 3.10.2 and 3.10.3 of the election petition.

Issue No 3

Whether the respondent by his alleged polling agent one Wong Kui En @ Norliah had committed corrupt practices by printing, publishing and distributing handbills which do not bear upon its face the names and addresses of its printers and publisher in contravention of s 11(1)(c) of the Act based on the particulars as pleaded in paras 3.9, 3.9.1, 3.9.2, 3.9.3 and 3.13 of the election petition.

Issue No 4

Whether the respondent by his alleged polling agent one Wong Kui En @ Norliah had committed corrupt practices by printing, publishing and distributing handbills which do not bear upon its face the names and addresses of its printer and publisher in contravention of s 32(c) of the Act based on the particulars as pleaded in paras 3.10, 3.10.1, 3.10.2, 3.10.3 and 3.13 of the election petition.

Issue No 5

In the event all or any one of the issues listed in paras 3.1 to 3.4 hereinabove is answered in the affirmative, whether the petitioner is entitled to the prayers as pleaded in para 5 of the election petition.

SUBMISSIONS OF THE APPELLANT

[4] Learned counsel for the appellant submitted that in the course of trial, the learned election judge had made a finding of facts as follows:

(a) Norliah was a polling agent for the respondent;

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(b) there was indeed the giving of RM50 notes and coupons to PW3 and PW4; and

(c) there was an element of inducement to vote for the respondent.

[5] It was the contention of the appellant that the learned election judge however erred when she decided that Norliah acted on a frolic of her own when she distributed the RM50 notes and coupons on the 4 May 2013, a day before the polling day. It was also submitted for the appellant that the learned election judge erred when she decided the appellant had failed to prove knowledge and consent of the respondent in relation to the act of Norliah in distributing the RM50 notes and coupons on the 4 May 2013. It is the appellant's case that Norliah is an agent to the respondent and as such there is no legal requirement to prove knowledge or consent under the third limb of s 32(c) of the Act. Section 32(c) of the Act provides as follows:

> 32 The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the election judge:
>
> (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate.

[6] For the appellant it was contended that he had never pleaded that the said Norliah was the polling agent of the respondent when distributing the RM50 notes and coupons or that the said Norliah committed the corrupt practices arid/or illegal practices in her capacity as the polling agent on the 4 May 2013. The learned election judge failed to consider the fact that on the 4 May 2014 the said Norliah was yet to be the respondent's polling agent. To the appellant prior to the election day the said Norliah was in fact the campaigner for the respondent during the campaigning period.

[7] It was submitted for the appellant that the learned election judge had made a conflicting finding in relation to the said Norliah's campaigning on the 4 May 2013 where at first, the learned election judge held that the act of the said Norliah in distributing RM50 notes and coupons was not out of altruism or benevolence as she did not even have a fixed employment. However, in the later part of her judgment, the learned election judge had given a conflicting view by holding that the act of the said Norliah in campaigning and giving out money and coupons with a promise of RM100 to be given if the respondent was elected was clearly outside the scope of her authority as a polling agent and it was on a frolic of her own.

[8] It was further submitted for the appellant that since the said Norliah was entrusted as the polling agent of the respondent and PKR as the political party

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on the election day, it would raise a strong inference that the said Norliah is one of the trusted campaigners, canvassers and/or agents of the respondent before the election day while distributing the RM50 notes and the coupons.

[9] It was also submitted for the appellant that it was never the appellant's pleaded case that the said Norliah was the polling agent of the respondent on the 4 May 2013 or that the said Norliah committed the corrupt practices and/or illegal practices in her capacity as the polling agent on 4 May 2013.

[10] The appellant contended that there is no strict legal requirement that there must be express evidence to prove that the said Norliah was acting under the instructions of the respondent. The learned election judge should invoke an adverse inference against the respondent under s 114(g) of the Evidence Act 1950 since neither Norliah nor her election agent was called to testify as witness for the respondent. Failing to call Norliah and/or election agent would suggest that Norliah, as the polling agent of the respondent had committed corrupt practice in connection with the election, specifically for the benefit of the respondent and not on a frolic of her own.

[11] Learned counsel for the appellant also impressed upon us that a polling agent is just a division of agency but an agent under election laws is wider than a polling agent. Under s 32(c) of the Act, it is not necessary for knowledge or consent of the respondent to be proven by the appellant as the petitioner if the corrupt practice was committed in connection with the election by any agent of the candidate which in this case is Norliah. It was the contention of the appellant that the interpretation of 'any agent' must include a polling agent.

DECISION

[12] Learned counsel for the appellant in one of the grounds of appeal contended that the acts by Norliah in distributing the RM50 notes and coupons on the 4 May 2013 would tantamount to her acting as an agent for the respondent. Learned counsel for the respondent however submitted that the appellant had in fact departed completely from the agreed issues to be tried. This is because the appellant had raised at this appeal stage the issue of 'agent' instead of 'polling agent'. On this point we are of the view the appellant is justified in raising and relying on the issue of agent to be imputed on Norliah as the appellant is taking the stand that the interpretation of 'agent' includes polling agent.

[13] The question that need to be addressed in this appeal is whether the said Norliah who was the respondent's polling agent on the election day and the respondent's campaigner and supporter before the election day as alleged by the

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appellant, can come within the definition of agent under the Act and for the respondent to be liable for the acts of Norliah as his agent.

[14] We are of the view in any event, to make the respondent liable for the acts committed by Norliah the appellant must adduce sufficient evidence to establish her appointment as the agent of the respondent on the 4 May 2013 before the election day. This is in compliance with the principle as laid down in the Federal Court's case of *Wan Sagar bin Wan Embong v Harun bin Taib* [2008] 6 MLJ 473; [2009] 1 CLJ 457 wherein it was held that mere campaigning by a party supporter for the candidate without the knowledge and consent of the candidate as to the supporter's acts does not make the supporter an 'agent' of the candidate. The Federal Court in *Wan Sagar*'s case held that the definitive scope of agency during elections must be identified. There had to be an element of appointment wherein there is a nexus or connection between the named or identified person alleged to be the agent and the respondent as the candidate.

[15] It is our judgment that the appellant failed to adduce sufficient evidence that Norliah was an 'agent' of the respondent on the 4 May 2013. The learned election judge was right on her finding as to the scope of authority of Norliah as a 'polling agent'. Without proof that Norliah as the campaigner was acting within the scope of her authority as an agent or with instructions and knowledge of the respondent on the 4 May 2013, her acts as a campaigner or party supporter during election campaign cannot make the respondent as the candidate liable.

[16] It is noted the learned election judge in arriving at her decision had cited established authorities on the subject of agency in relation to the trial of election petition. Amongst others she had referred to a passage in the *Reports of the Decisions of the Judges for the trial of Election Petitions in England and Ireland by Edward Loughlin O'Malley & Henry Hardcastle, Vol III* and quoting the judgment of Mr Justice Lush in the case of *Harwich Borough Case, Tomline v Tyler* (1880) 3 O'M & H 61, inter alia, at pp 69–70 as follows:

> An agent is a person employed by another to act for him and on his behalf either generally or in some particular transaction. The authority may be actual, or it may be implied from circumstances. It is not necessary in order to prove agent to show that the person was actually appointed by the candidate. If a person not appointed were to assume to act in any department of service as election agent, and the candidate accepted his services as such, he would thereby ratify the agency, so that a man may become agent of another in either of two ways, by actual employment or by recognition and acceptance. The next question is, if agent, what is he agent for? If a person were appointed or accepted as agent for canvassing generally, and he were to bribe or treat any voter, the candidate would lose his seat. But if he was employed or accepted to canvass a particular class, as if a master were asked to canvass his

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> workmen, and he went out of his way and bribed a person who was not his workman, the candidate would not be responsible, because this was not within the scope of his authority. *And for the same reason, if a person whom the candidate had not in any way authorized to canvass at all for him, were to take upon himself to bribe a voter, the candidate would not be responsible for the wrongful act. No candidate could ever secure a seat, if he were made answerable for the act of unauthorized persons.* (Emphasis added.)

[17] We are of the view the learned election judge was correct in her decision that Norliah's action on the 4 May 2013 was outside the scope of the duty as 'polling agent'. What Norliah did on the 4 May 2013 was her own acts and rightly described by the election judge as 'on a frolic of her own'. It must be appreciated that the impugned acts were committed on the 4 May 2013 but not on the 5 May 2013. The 'polling agent' was only required to be on duty on polling day, 5 May 2013 for at least two hours as provided for under the Act. Section 14(1A) of the Act provides as follows:

> Every polling agent or counting agent of a candidate appointed under subsection (1) shall act or be present at the polling station or shall attend the counting of votes at the polling station for at least two hours and his replacement shall only be admitted to that polling station on the expiration of the two-hour period.

Thus, the impugned acts allegedly committed by Norliah on the 4 May 2013 before her performance and discharge of her duty as 'polling agent' cannot make the respondent liable.

[18] It was also contended for the appellant as one of his grounds of appeal that the learned election court judge erred as a matter of fact and/or law by failing to properly address her mind that based on the pleadings of the appellant, it was never the appellant's pleaded case that Norliah distributed the RM50 notes and coupons on the 4 May 2013 in her capacity as the polling agent of the respondent. On this ground raised by the appellant we are in agreement with the contention of the respondent that the appellant as the petitioner had failed to provide sufficient facts and grounds that Norliah was an agent for the respondent on the 4 May 2013 apart from merely making statement that the corrupt or illegal practice was committed by her as an 'agent' of the respondent. The appellant has not even proved that Norliah was the polling agent of the respondent as prescribed under sub-ss 14(c) and (d) of the Act.

[19] The appellant had failed to provide sufficient facts and grounds pursuant to r 4(1)(b) and 4(4) of the Election Petition Rules 1954 ('EPR') in so far as the nexus required to implicate the culpability of the respondent and void the election under ss 32(b) and 32(c) of the Act. It must be stated here that compliance with r 4(1)(b) and 4(4) of the EPR is mandatory (see *Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors* [2009] 5 MLJ 153). It is not

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known as to how and by whom Norliah was appointed as an agent of the respondent. The appellant had to plead this element of 'appointment' in order to allow the respondent to meet his case. The Federal Court in the case of *Wan Sagar* had ruled that the principle of agency in election laws although wider should not be extended as to cast the net of agency too wide to include even ordinary party supporters.

[20] The appellant contended that an inference can be drawn to connect Norliah as the trusted campaigner and agent of the respondent before the election day which included the material date of 4 May 2013. We are in agreement with the finding of the learned election judge that there was no evidence to support this inference at all. It has not been shown to the satisfaction of the court and showed with certainty that the respondent had knowledge of and consented to the corrupt act of Norliah in giving out envelopes with RM50 notes and coupons which can be produced to redeem a further sum of RM100 if the respondent was elected.

[21] The appellant contended that the learned election judge erred in holding that there was no evidence to prove that the said Norliah was acting under the instruction of the respondent when committing the preferred charges on the 4 May 2013. In response to this contention of the appellant, it is our considered view that the learned election judge did not err as a matter of fact and/or law because the appellant could not prove that there was such an instruction. The appellant tried to implicate Norliah with the text messages received by PW6 from the phone No 0146757076. However there was no evidence linking Norliah's actions on the 4 May 2013 to the text messages from the phone Nor 0146757076 alleged to be respondent's phone number. PW6 admitted in court that he was not even sure if that phone number was indeed the respondent's phone number. PW6 testified that he obtained the phone number from Harris bin Tarip and Awang Ahmad Silim who told him that it belonged to the respondent. The evidence given by PW6 based on what Awang Ahmad Silim and Harris bin Tarip had told him that the phone number belonged to the respondent both of whom were not called as witnesses is in fact hearsay and not admissible in court.

[22] As regards the contention of the appellant that neither Norliah nor the respondent's election agent was called to testify as a witness for the respondent and for that reason an adverse inference under s 114(g) of the Evidence Act 1950 should be invoked against the respondent, it is our considered view that such a contention is untenable in the circumstances of this case. The burden is placed upon the appellant to first prove his case against the respondent. It is settled law in election petition cases that it is for the appellant as the petitioner to establish a prima facie case before the respondent is required to answer (see *Audrey Karen Barry v Datuk Dr Yee Moh Chai* [2009] 3 MLJ 141; [2010] 3

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CLJ 660 (FC)]. In the present case it was for the appellant to prove who this so-called Norliah was and that she was the appointed agent of the respondent who distributed the RM50 notes and coupons on the 4 May 2013. This the appellant however had failed to prove.

CONCLUSION

[23] For the reasons abovestated we find no merits in the appellant's appeal. The appeal is therefore dismissed with costs.

Appeal dismissed with costs.

Reported by Kanesh Sundrum